Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

STANLEY E. ALGEE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

1. Was Stanley Algee's conviction unconstitutional in light of the special verdict of the jury which held the amount of crack cocaine at issue in the conspiracy to be in excess of five grams and not over fifty grams on which the twenty-year sentence was based?

2. Did the introduction into evidence of additional firearms not listed in the superseding indictment together with the District Court's vague instructions regarding "a firearm" impermissibly broaden the superseding indictment resulting in a violation of Algee's constitutional rights and warranting reversal on Count 3?

3. Should Algee's conviction on all four counts be reversed due to the government's vindictive prosecution of him?

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

Stanley E. Algee respectfully petitions the Supreme Court of the United States for a Writ of Ceritorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, rendered and entered in case number 01-2208 in that Court on October 31, 2002 and amended on November 8, 2002, which affirmed the judgment and sentencing of the United States District Court for the Southern District of Illinois.

## OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Seventh Circuit, affirming the judgment and sentencing of the United States District Court for the Southern District of Illinois is contained in Appendix a A1-A11.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rule 10(c) of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals from which review is sought was entered on October 31, 2002 and amended on November 8, 2002. This petition is timely filed in accordance with Sup.C.R. 13.1. The District Court exercised its jurisdiction pursuant to federal law because Mr. Algee was charged in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 846, 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(c). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 18 U.S.C. § 3742, which provide that courts of appeal shall have jurisdiction for all final decisions of the United States District Courts.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Algee intends to rely upon the following constitutional and statutory provisions:

**U.S. Const. amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be deprived of life, liberty, or property without due process of law . . .

**U.S. Const. amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . .

## 21 U.S.C. § 841

**(a) Unlawful Acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

**(b) Penalties**

Except as otherwise provided in section 859, 860, or 961 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

> (1)(A) In the case of a violation of subsection (a) of this section involving -
>
> > (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . .
> >
> > such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .
>
> (1)(B) In the case of a violation of subsection (a) of this section involving -
>
> > (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . .

> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . .
>
> (1)(C) In the case of a controlled substance in schedule I or II . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years . . .
>
> (1)(D) In the case of less than 50 kilograms of marihuana . . .such person shall . . .be sentenced to a term of imprisonment of not more than 5 years . . .

**21 U.S.C. § 846**

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commissions of which was the object of the attempt or conspiracy.

**18 U.S.C. § 922**

(g) It shall be unlawful for any person -

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or

ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

**18 U.S.C. § 924(c)**

**Penalties . . .**

**(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -

> (i) be sentenced to a term of imprisonment of not less than 5 years; . . .

**(4)** For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

## STATEMENT OF THE CASE

On December 18, 1996, Stanley Algee was apprehended by the Jackson County Sheriff in connection with a home invasion and robbery that took place in Grand Tower, Illinois. (R. Tr. Vol. III, p. 124.)

## The State Case

Algee was first tried in Illinois state court and found guilty on charges of armed violence, home invasion, armed robbery and aggravated battery. (Sentencing Hr'g at 30, *People v. Algee*, No. 96-CF-656 (Dec. 10, 1997), the "related state case.") Algee's state conviction was reversed on appeal due to a speedy trial violation. (R. Vol. I, Doc. 77; *People v. Battles*, 311 Ill. App. 3d 991, 724 N.E.2d 997, 244 Ill. Dec. 109, (5th Dist. 2000).)

On February 23, 2000, Algee was charged in a two-count indictment with unlawful possession of a semi-automatic rifle by a convicted felon in violation of 18 U.S.C. § 922 (g) (1) and for a violation of 21 U.S.C. § 924 (c), for the use or carrying of a firearm in relation to conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841 (a) (1) and 846. (Indictment at 1-2, R. Vol. I, Doc. 1.) In a Superseding Indictment filed September 21, 2000, Algee was charged with two additional counts: conspiracy to distribute and conspiracy to possess with intent to distribute crack cocaine in violation of 21 U.S.C. §§ Section 841(a) (1) and 846 and conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841 (a)(1) and 846. (Superseding Indictment at 1-3, R. Vol. I, Doc. 45.) Algee pleaded not guilty to all charges. (R. Vol. I, Doc. 51.)

On June 30, 2000, the Government filed a motion to disqualify Algee's counsel of choice, Paul Christenson. The government alleged that Christenson had an unwaivable conflict of interest in his representation of Algee due to Christenson's representation of two alleged co-conspirators, Battles and Marvin Gates ("Gates"), and a witness, Eldridge

Hartley ("Hartley"), and because Christenson himself appeared as a defense witness at trial in Algee's related state case. (Gov't Mot. to Disqualify Atty Christenson, R. Vol. I, Doc. 8.) Algee objected to the disqualification of his counsel of choice and requested a hearing to waive any possible conflict. (Def.'s Resp. Opp'n Mot. Disqualify at 1, R. Vol. I, Doc. 12.)

Magistrate Judge Frazier denied the Government's Motion to Disqualify Attorney Paul Christenson. (Minutes of Court of July 14, 2000, R. Vol. I, Doc. 13.) The Government filed a Motion to Reconsider Motion to Disqualify Attorney Paul Christenson. (R. Vol. I, Doc. 15.) In that motion, the Government raised new allegations against Christenson, asserting he had engaged in criminal conduct involving the purchase of cocaine, encouraged perjury, and received cocaine in exchange for legal services. (Gov't Mot. to Recons. Mot. Disqualify at 2, R. Vol. I, Doc. 15.) Christenson submitted a sworn affidavit denying the Government's allegations. (Christenson Aff. ¶¶ 1-2, R. Vol. I, Doc. 19.) On August 14, 2000, Judge Foreman granted the Government's Motion to Disqualify Christenson and Motion to Reconsider. (R. Vol. I, Doc. 30.)

Thereafter, Algee chose to proceed *pro se*. The District Court appointed counsel Marilyn Rydlund, a lawyer unknown to Algee, to act as standby counsel. Rydlund filed her appearance on August 28, 2000. (Tr. Pretrial Conf., Aug. 28, 2000 at 2.) Algee later accepted Rydlund as his acting counsel in October 2000. (Tr. Proceedings, Oct. 10, 2000 at 4.)

## The Trial and Conviction

A six-day jury trial was held during which 40 witnesses testified on behalf of the Government. Of these, 26 were admitted drug dealers, convicted felons or current or past crack cocaine users. (R. Vol. II, pp. 35, 68, 93, 98, 114, 119, 143, 151, 163, 169, 170, 197; Vol. III, pp. 6, 16, 32, 43, 55, 69, 80; Vol. IV, pp. 11, 95; Vol. V, pp. 3, 30, 87, 98.) The Government's principal witnesses against Algee were co-defendant and alleged co-conspirator Battles and alleged co-conspirator Gates. (Tr. Test. Brent Battles, Vol. III, p. 14; Tr. Test. Marvin Gates, Vol. V, p. 119.) Algee was found guilty on all counts. (R. Vol. II, Docs. 97-101.) The jury returned a special verdict on Count 1 that the Government had proved beyond a reasonable doubt that the amount of "crack cocaine" at issue in the conspiracy exceed 5 grams. (R. Vol. II, Doc. 98.)

## The Sentence

Algee was sentenced on May 1, 2001 to 240 months on Count 1, 120 months each on Counts 2 and 3 to run concurrently with Count 1 and 60 months on Count 4 to run consecutively with Count 1. (R. Vol. II, Doc. 135.) Applying the United State Sentencing Guidelines, the District Court first assigned Algee a Base Offense Level of 34 and then added two points due to obstruction of justice, resulting in an Adjusted Offense Level of 36 (R. Vol. II, Doc. 135 and Sentencing Hr'g at 13 and 18.) The District Court also placed Algee in Criminal History Category III. *Id.* Algee was further sentenced to a supervised release of eight years on Count 1, four years on Count 2 and a range of two to three years on Counts 3 and 4. *Id.* Algee filed a timely notice of appeal from the final judgment on April 30, 2001. (R. Vol. II, Doc. 136.)

## The Appeal

Algee filed his notice of appeal on April 30, 2001. The Seventh Circuit appointed the undersigned counsel as appellate counsel on December 18, 2001 pursuant to the Criminal Justice Act.

Algee argued that his due process rights were violated when the District Court abused its discretion in disqualifying his counsel of choice; that his rights had been violated by the government's vindictive prosecution of him; that the prosecution constituted an unconstitutional sham prosecution barred by double jeopardy; that his firearm convictions were the result of an impermissible broadening of the superseding indictment, and; that the District Court committed plain error by enhancing his sentence on the crack cocaine conspiracy by finding that it involved in excess of 50 grams of crack cocaine without submission of that fact to the jury. The Seventh Circuit affirmed the District Court in a published decision, *United States v. Algee*, 309 F.3d 1011 (7th Cir. 2002). Algee did not seek rehearing, but instead seeks a Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

Algee was charged and convicted in a special verdict for his alleged participation in a conspiracy involving in excess of five grams of crack cocaine. However, Algee's sentence was unconstitutionally increased due to a relevant conduct finding of over 50 grams of crack cocaine without submission of this fact to the jury and without a finding of such beyond a reasonable doubt.

Although the jury convicted Algee on two guns specifically identified in the Superseding Indictment, three additional guns were introduced into evidence during the trial, and the jury was instructed that they should convict if they determined that Algee possessed any firearm as opposed to only those listed with particularity in the indictment. This impermissible broadening of the indictment resulted in plain error on the part of the District Court and resulted in a violation of Algee's substantial rights.

Algee was convicted as a result of prosecutorial vindictiveness on the part of the government. Algee's counsel of choice successfully defended Algee in at least four state court prosecutions. Algee was prosecuted by the same individuals at the federal level, where he was deprived of his counsel of choice because of the Government's allegations of criminal conduct on the part of Algee's counsel of choice, allegations that never resulted in any disciplinary action against Algee's counsel.

## ARGUMENT

### I.

**Algee's sentence on Count 1 was unconstitutional without a submission to the jury and finding beyond a reasonable doubt that the crack conspiracy involved in excess of 50 grams.**

The constitutional limitation that every fact necessary to constitute a crime be found beyond a reasonable doubt by a jury if that right is not waived is intended to "protect the criminal defendant's constitutional right to know, *ex ante*,

those circumstances that will determine the applicable range of punishment and to have those circumstances proved beyond a reasonable doubt." *United States v. Harris*, No. 00-10666, 2002 WL 1357277, at *20 (Thomas, J., dissenting).

The District Court's imposition of a sentencing enhancement of ten years is plainly unconstitutional and warrants an order vacating the same. Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), facts which increase a defendant's sentence beyond the statutory maximum must be charged in the indictment, submitted to the jury and proven beyond a reasonable doubt. *Id.* at 490. The principles on which the *Apprendi* court relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum as to a fact that increases the penalty for a crime beyond the statutory maximum. *United States v. Harris*, No. 00-10666, 2002 WL 1357277, at *21 (U.S. June 24, 2002)(Thomas, J., dissenting). In light of *Apprendi*, a fact that increased the minimum penalty for a crime, though not beyond the statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt. *Harris*, 2002 WL 1357277.

Algee was charged with conspiracy to distribute "in excess of 5 grams" of crack cocaine. (Superseding Indictment, Count 1, R. Vol. I, Doc. 45.) The jury returned a special verdict on Count 1 finding that Algee was guilty of the conspiracy and that in excess of 5 grams of crack cocaine was involved in the conspiracy. (R. Verdict, Vol. II, Doc. 98.) During the sentencing hearing, the Government moved for an upward departure in the sentencing guidelines based upon evidence that more than 50 grams was involved in the crack cocaine conspiracy. (Sentencing Hr'g at pp. 5-6.) The Government argued that the testimony of the co-

conspirators' added up to over 50 grams of crack cocaine which warranted an increase in the minimum level of possible sentence under §§ 841(b)(1)(B) and 851. *Id.*

The Government was well aware of the amount of crack cocaine which they would move to place into evidence in this trial. The Government's decision to charge Algee with only "in excess of 5 grams of crack cocaine" was clearly within their discretion. *United States v. Sandoval-Curiel*, 50 F.3d 1389, 1394 (7th Cir. 1995). However, because the Government knew that they intended to produce evidence that the conspiracy involved "in excess of 50 grams" and because they intended all along to move for a sentence based upon the amount of over 50 grams of crack, that discretion was exceeded here.

The difference in the mandatory minimum sentences for the two different amounts of crack cocaine at issue is ten (10) years. Under 21 U.S.C. §§ 841 (b)(1)(B) and 851, the minimum sentence for a special finding by the jury of an amount in excess of 5 grams is ten (10) years. However, the Government objected to the Presentence Report as to Count 1 and argued that due to Algee's relevant conduct, allegedly consisting of over 50 grams of crack cocaine, the minimum sentence should be raised to twenty (20) years. (Addendum to Present. Rep., R. Vol. II, Doc. 133) The probation officer who authored the Presentence Report responded that the Government could have filed an indictment and requested a specific verdict that included "in excess of 50 grams of cocaine base," and since the Government chose not to do so, the probation officer used the lesser penalty provision set forth in 21 U.S.C. §§ 841 (b)(1)(B). (Addendum to the Present. Rep., R. Vol. II, Doc. 133.)

In his dissent in *Harris*, 2002 WL 1357277, Justice Thomas, with whom Justices Stevens, Souter and Ginsburg joined, noted that *Apprendi* conflicts with the mandatory minimum sentencing provisions. Similar to Algee, the defendant in *Harris* was indicted for a violations of 21 U.S.C. § 841 and 18 U.S.C. § 924(c)(1)(A). *Harris*, 2002 WL 1357277. Harris pleaded guilty to the marijuana distribution charge but contested the charge of carrying a firearm "in relation to" a drug trafficking crime. *Harris*, 2002 WL 1357277 at *18. Nevertheless, despite Harris' objections, the District Court found Harris guilty of § 924(c)(1)(A). At sentencing, the District Court relied on the presentence report and found by a preponderance of the evidence that Harris had "brandished" the firearm. *Id.* As a result, the mandatory minimum sentence for the §924(c)(1)(A) violation of five years in prison was increased to seven years. *Id.*

Algee's increased minimum sentence is even more severe than at issue in *Harris*. Algee was subjected to a ten year increase in his minimum sentence. *Apprendi* mandates that Algee's sentence on Count 1 be vacated and the facts upon which the Government expects to present at sentencing be put to a jury and proved beyond a reasonable doubt before the increased minimum sentence of twenty years may be imposed upon him. In the alternative, Algee's conviction on Count 1 should be vacated and he should be sentenced on the drug quantity of "in excess of five grams" contained in the Superseding Indictment and on which he was convicted by the jury.

This Court should follow the direction provided by the dissent in *Harris* and find that *Apprendi* applies to mandatory minimum sentences. The doctrine of *stare decisis* is not inflexible. "*[S]tare decisis* is a principle of policy and

not a mechanical formula of adherence to the latest decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citations omitted). "The well-settled proposition that *stare decisis* has less force where intervening decisions 'have removed or weakened the conceptual underpinnings from the prior decision.'" *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 104 (1993) (Scalia, J., concurring) *citing*, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

A party advocating overruling precedent in the context of constitutional interpretation, as Algee does here, does not have as great a burden as is on the party advocating overruling precedent on a point of statutory construction because in the latter cases, the legislative power is implicated. *Id.* at 172-173 (citations omitted). Here, statutory construction is not at issue and therefore, applying *Apprendi* to Algee's sentence is wholly within this Court's power.

Algee had the right "to be informed of the nature and cause of the accusation," against him and the right to be "held to answer for a capital, or otherwise infamous crime" only on an indictment or presentment of a grand jury, and the right to be tried by "an impartial jury of the State and district wherein the crime shall have been committed." Amdts. 5 and 6.

Justice Thomas objected to the plurality opinion in *Harris* and noted:

> But when the legislature provides that a particular fact shall give rise "'both to a special stigma and to a special punishment,'" [*Harris*, 2002 WL 1357277] at 12 (plurality

> opinion)(quoting *McMillan*, 477 U.S. at 103 (STEVENS, J., dissenting)), the constitutional consequences are clear. As the Court recognized in *Apprendi*, society has long recognized a necessary link between punishment and a crime, 530 U.S., at 478 ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime"). . . We made clear in *Apprendi* that if a statute "'annexes a higher degree of punishment'" based on certain circumstances, exposing a defendant to that higher degree of punishment requires that those circumstances be charged in the indictment and proved beyond a reasonable doubt. *Id.* at 480 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 51 (15th ed. 1862)).

*Harris*, 2002 WL 1357277 at *21-22. (Thomas, J., dissenting).

> An increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards. . . there are no logical grounds for treating facts triggering mandatory minimums any differently that facts that increase the statutory maximum. In either case the defendant cannot predict the judgment from the face of the felony, see 530 U.S., at 478-479, and the absolute statutory limits of his punishment change, constituting an increased

> penalty. In either case the defendant must be afforded the procedural protections of notice, a jury trial, and a heightened standard of proof with respect to the facts warranting exposure to a greater penalty. [citations omitted].

*Harris*, 2002 WL 1357277 at *21-22. (Thomas, J., dissenting).

The decision in *Harris* was not supported by a majority of the Court. Justice Breyer concurred in part and concurred in the judgment but recognized that he "cannot easily distinguish *Apprendi* . . . from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction." *Harris*, 2002 WL 1357277 at *20 (Breyer, J., concurring in part and concurring in judgment). Therefore, only a minority of the Court supports the inapplicability of *Apprendi* to mandatory minimum sentencing arguments.

Moreover, defendant's constitutional right to know his potential sentence and the evidence that the Government intends to produce to support that sentence is protected in the area of plea agreements by Federal Rule of Criminal Procedure 11. Pursuant to Rule 11, a defendant who intends to offer a plea of guilty or *nolo contendere* must be advised of the nature of the charge to which the plea is offered as well as the mandatory minimum penalty provided by law. FED.R.CRIM. P. 11(C)(1). In *United States v. Still*, 102 F.3d 118 (5th Cir. 1996) the defendant's guilty plea on one count was vacated because the district court failed to inform him of the proper mandatory minimum sentence on that count pursuant to FED.R.CRIM.P. 11. *Id.* at 126.

While Algee did not plead guilty or *nolo contendere* is this case in order to fall under the protection of Rule 11, his ability to formulate a well-informed decision as to whether to plead guilty or not guilty was certainly hampered by the fact that his belief that a possible mandatory minimum sentence based upon Count 1 of the Superseding Indictment was ten (10) years. Had he been afforded his constitutionally protected right to know that he could face a mandatory minimum sentence of twenty (20) years on Count 1 for a conviction of the 21 U.S.C. § 841(a)(1) charge, Algee may have taken an entirely different position with regard to his plea. *See Still*, 102 F.3d at 126.

The Government was too fearful of not convincing the jury beyond a reasonable doubt that the alleged conspiracy involved an amount "in excess of 50 grams" and therefore only charged Algee with "in excess of 5 grams." The Government then waited until the sentencing hearing to move for the upward departure based upon the "over 50 grams" amount. This is plain error and a violation of Algee's right to have notice of the maximum sentence he may be facing. In *United States v. Adkins*, 274 F.3d 444 (7th Cir. 2002) the court determined that because it was not certain that a properly instructed jury would have found beyond a reasonable doubt that defendant had distributed in excess of 100 grams of methamphetamine, his sentence was vacated. *Id.*, 274 F.3d 444, 456 (7th Cir. 2002). *See also United States v. Palmer*, 248 F.3d 569 (7th Cir. 2001)( doubts about the government's evidence of 241 grams of crack "piled on" as relevant conduct in the presentence report gave the court "great pause even if only a portion of it is needed to move Palmer over 150 grams" requiring the sentence be vacated and the case remanded for resentencing.)

Similarly, because it is uncertain whether the jury would have found beyond a reasonable doubt that Algee had conspired to distribute in excess of 50 grams of crack in connection with Count 1, his sentence must be vacated. *Id.* Accordingly, this Court should grant Algee's Petition for Writ of Certiorari.

II.

**The superseding indictment was impermissibly broadened by the government's introduction of confusing and conflicting evidence and the District Court's improper jury instructions warranting reversal of Algee's conviction on Count 3.**

The conviction of Algee on Count 3 based upon the evidence introduced regarding the three additional firearms not specifically listed in the Superseding Indictment cannot withstand constitutional scrutiny. The District Court simply instructed the jury that they needed to find that Algee "knowingly possessed a firearm. . . " in order to convict on Count 3. (Tr. Jury Instructions at 27.) This instruction did not convey the correct message to the jury reasonably well as required under *Dawson v. New York Life Ins. Co.*, 135 F.3d 1158, 1165 (7th Cir. 1998). Because the Court cannot speculate about which firearm the jury determined Algee "knowingly possessed," to support a conviction of Count 3, the conviction on Count 3 must be reversed.

In reviewing a claim that a jury instruction was incorrect, this court stated in *Dawson* that the Court "look[s] to the instructions as a whole, in a common sense manner, avoiding fastidiousness, inquiring whether the correct message was conveyed to the jury reasonably well." *Id.* at 1165 (citations omitted). If the instruction failed to convey

the correct message to the jury reasonably well, then the court must ask whether the misleading instruction prejudiced the complaining party and if so, then the proper remedy is a new trial. *Id.* (citations omitted). The court cannot speculate about which theory the jury chose. *Id.* (citations omitted).

Algee was indicted for a violations of 18 U.S.C. §§ 922 (g)(1) and 924 (c). (Superseding Indictment Counts 3 & 4, R. Vol. I, Doc. 45.) The Superseding Indictment specifically listed a "Norinco, model SKS, 7.62 caliber, semi-automatic rifle and a Harrington and Richardson, model "Victor, .22 caliber revolver." *Id.* At trial, evidence was given regarding five firearms: two model SKS rifles; one .22 pistol; one ".32", and; one pellet gun. (R. Vol. II, Doc. 96, Trial Exhibits 28 - 31; Tr. Vol. III, pp. 27 and 74; Tr. Vol. V, pp. 131-132, 142 and 151-152.)

The inconsistencies between the Superseding Indictment and evidence admitted at trial have constructively amended the Superseding Indictment. The Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury . . ." U.S. Const. Amend V. Is it well settled that an indictment may not be amended except by resubmission to the grand jury. *See Russell v. United States*, 369 U.S. 749, 770 (1962). Although there are two exceptions to the general rule, neither applies in this case. The Superseding Indictment was neither modified to correct for a typographical or clerical error or a misnomer, (*See United States v. Kegler*, 724 F.2d 190, 193-195 (D.C. Cir. 1984)) nor was it narrowed. *See United States v. Leichtnam*, 948 F.2d 370, 375 (7th Cir. 1991).

Although an indictment may be narrowed, so that the trial jury deliberates on fewer offenses than the grand jury charged, the indictment may not be broadened, so as to present the trial jury with more or different offenses than the grand jury charged. Impermissible broadening of the indictment was set out in *United States v. Stirone*, 361 U.S. 212, 217-218 (1960). In *Stirone*, the defendant was charged with obstructing shipments of sand. *Id.* At trial, the government tried to show that the defendant had obstructed both shipments of sand and shipments of steel. The jury was instructed on both and the defendant was convicted. *Id.* The Supreme Court reversed the conviction due to the impermissible broadening of the indictment. *Id. at* 217-218 (1960).

In *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991) the indictment charged the defendant with using a particular Mossberg rifle in conjunction with a drug trafficking crime. At trial, evidence was admitted relating to two other guns. *Id. at* 379-381 (7th Cir. 1991). The court instructed the jury that it had only to find that the defendant used or carried any firearm to convict him. *Id. at 381.* The specificity of the indictment in *Leichtnam* permitted a conviction only if the jury found that the defendant carried or used the Mossberg rifle. *Id. at 381.* The Seventh Circuit reversed the conviction because there was no way of knowing if the jury convicted the defendant because it found he used or carried the Mossberg rifle or one of the other guns introduced at trial. *Id. at* 380-381 (7th Cir. 1991). The court determined that the introduction of the handguns, together with the jury instructions, impermissibly amended the indictment by broadening the possible bases for conviction to include knowingly using or carrying any firearm. *Id. at 381.* This was clear error mandating reversal.

*Id. See also United States v. Miller*, 471 U.S. 130, 138 (1985). *United States v. Weissman*, 899 F.2d 1111, 1114 (11th Cir. 1990); *Howard v. Daggett*, 526 F.2d 1388, 1390 (9th Cir. 1975), and; *United States v. Adams*, 778 F.2d 1117, 1125 (5th Cir. 1985).

Similarly, the Superseding Indictment at issue here, charged Algee specifically with knowingly possessing a Norinco, model SKS and a Victor .22. *See supra* at p. 23. The Government chose to frame the Superseding Indictment in specific terms by including the Victor .22 and one of the Norinco SKS rifles as essential parts of the charge and therefore limited the bases for a possible conviction to those specific two guns. *See Leichtnam*, at 379. During the trial, evidence was given regarding five firearms: two model SKS rifles, one .22, one .32 and a pellet gun. The District Court then instructed the jury that: "[t]o sustain the charge of unlawful possession of a firearm the government must prove . . . that on or about December 18th, 1996, the defendant knowingly possessed a firearm . . . " (Tr. Jury Instructions at 27, lines 18-25, *emphasis added.*)

As in *Leichtnam*, it is unclear in this case whether the jury convicted Algee on the specific weapons listed in the indictment or on the conflicting evidence introduced at trial of another Norinco SKS, the .32 or the pellet gun. This is plain error and therefore Algee's conviction on Count 3 must be reversed. *See Leichtnam*, at 381.

Accordingly, this Court should grant Algee's Petition for Writ of Certiorari.

## III.

**Algee's convictions on all four counts must be reversed as they were the result of the government's vindictive prosecution of Algee.**

The Government displayed a genuine animus toward Algee in its prosecution of him. By the time Algee was released from custody following the reversal of his conviction in the related state case, the Government had instituted proceedings relating to the same conduct on which Algee had just been acquitted. Algee's conviction was the result of a vindictive prosecution.

First, Algee's due process rights were violated when he was punished for successfully appealing his related state court conviction by bringing more serious charges against him under the stricter federal statutes for the same conduct. Second, the spectre of vindictiveness is demonstrated by the fact that the subsequent federal charges were brought by the prosecutors who had prosecuted Algee on at least four prior occasions in Illinois state court and lost. (Tr. Vol. III, p. 60, line 11 and p. 69; Present. Invest. Rep., R. Vol. II, Doc. 133, p. 17-18.) The Government lodged allegations that Algee's counsel of choice had engaged in illegal conduct, ultimately leading to his disqualification. The likelihood of vindictiveness is evident by the swiftness of the Government's initial unsuccessful motion to disqualify Christenson on the heels of the reversal of the related state case and the ultimate absence of any charges against Christenson for his rumored criminal activity.

When confronted with a claim of prosecutorial vindictiveness the proper inquiry is whether there exists a "realistic likelihood of vindictiveness." *See Blackledge v.*

*Perry*, 417 U.S. 21, 27 (1974). Under *United States v. Andrews*, 633 F.2d 449, 454 (6th Cir. 1980), a court must weigh two factors in assessing a prosecutorial vindictiveness claim: (1) whether the prosecutor had a "stake" in deterring the exercise of some right, and (2) the prosecutor's conduct. *See Id.* The more significant the "stake" in deterring the exercise of some right, the more likely the prosecutors' conduct was vindictive. *See Id.* The *Andrews* court found a distinction between a prosecutor charging a defendant with a new crime or bringing more serious charges for the same crime, the latter clearly suggesting a likelihood of vindictiveness. *See Id.* "A case of vindictive prosecution could be made out on proof that the federal prosecutors initiated a federal prosecution with the vindictive motive of punishing certain defendants for having exercised their rights under state law." *United States v. Gervasi*, 562 F.Supp. 632, 642 (N.D. Ill. 1983).

This case presents the fact scenario that the *Gervasi* court contemplated. Clearly, following his successful appeal had Algee been retried in state court on more serious charges stemming from the same alleged crimes, the prosecutor's conduct would present a likelihood of vindictiveness. Although it might appear that presumption does not apply here because Algee was subsequently charged in federal court, the federal prosecutors in this case had a history of losing their prosecutions of Algee when they were state prosecutors. (R. Tr. Vol. III, p. 60, line 11). As such, the notion that Algee was charged by two independent sovereigns is without merit under the circumstances.

The Government initiated the federal prosecution after Algee successfully appealed the conviction of the state

charges. The federal prosecutor clearly had a "stake" in this matter because he and members of his staff had previously failed after at least four attempts, to convict Algee. *See Andrews*, 633 F.2d 449, 454 (6th Cir. 1980). Furthermore, the prosecutor ("Grace") had a history of inappropriate conduct with regard to Algee. During one of the failed state prosecutions of Algee, Grace visited Algee in an interview room at the jail where Algee was incarcerated without the permission or knowledge of Algee's defense counsel to discuss Algee's plea. *People v. Algee*, 228 Ill. App. 3d 401, 405, 591 N.E.2d 1001, 1004 (5th Dist. 1992). Grace admitted that he told Algee during that conference that it was Algee's last chance to take the State's plea offer and that he used profanity and raised his voice toward the end of the conversation. *Id.* This history of the inappropriate conduct and the personal attacks made by the Government during Algee's sentencing hearing (See Appellant's Opening Brief at 15 and Sentencing Hr'g at 20-21) reflect a history of intense personal animus toward Algee.

Courts have traditionally found prosecutorial vindictiveness in cases of post-trial retaliatory conduct. Vindictive conduct exists, for example, when a prosecutor "ups the ante" by bringing more serious charges against a defendant on retrial following a successful appeal. *See Blackledge v. Perry*, 417 U.S. 21, 27 (1974). Such conduct, in retaliation of a defendant's exercise of his constitutional rights, is unconstitutional under the due process clause of the fourteenth amendment. *See North Carolina v. Pearce*, 395 U.S. 711, 725 (1969).

Relying on *Pearce*, the court in *Blackledge*, announced a similar rule for prosecutorial conduct. *See Blackledge*, 417 U.S. at 27. In *Blackledge*, the court held that a prosecutor

violated a defendant's due process rights by bringing a more serious charge after the defendant exercised his statutory right to appeal to a trial de novo. *Id.* When confronted with a claim of prosecutorial vindictiveness the proper inquiry is whether there exists a "realistic likelihood of vindictiveness." *Id.*

Moreover, the exceptional circumstances such as the threat of a greater penalty demand flexibility in reviewing Algee's claim of vindictive prosecution. *United States v. Nichols*, 937 F.2d at 1261 (7th Cir. 1991). Algee exercised his constitutional right to appeal his state conviction and forty-year sentence which was reversed. *People v. Battles*, 311 Ill. App. 3d 991, 724 N.E.2d 997 (5th Dist. 2000). The maximum penalty which Algee faced under the Superseding Indictment was life imprisonment. (Present. Invest. Rep., R. Vol. II, Doc. 133.) The threat of a greater penalty faced by Algee under the federal charges warrants review of this issue for plain error.

The Government's vindictiveness is further demonstrated in the motion for upward departure from the sentencing guidelines in this case (Gov't Mot. Upward Departure, R. Vol. II, Doc. 129) and the repeated references to murder and aggravated battery charges brought by the Jackson County State's Attorney on which Algee was acquitted. (Sent. Hr'g at 19-22.) The Government simply could let go of their inability to convict Algee on state charges. The Government continues to press these past cases. The Government attempted to exploit the lesser standard of proof for assessment of criminal history points – preponderance of the evidence – to achieve what they could not prove to a jury beyond a reasonable doubt. (Sentencing Hr'g at 24, lines 17-25.)

Additionally, the prosecutor's argument at the Sentencing Hearing reflects the Government's animosity toward Algee:

> [b]eat a 46-year murder sentence. . . he absolutely beat it. . . We've seen by Mr. Algee we're not dealing with a reasonable person. His plans, they're hair-brain plans. The plan to rob Jeremiah it was hair-brain that went tragically bad. The home invasion in Grand Tower it was a hair-brain plan . . .and the problem with Mr. Algee is as simple as he is, and as simple as his plans are, there is always going to be a stupider [sic] 21 or 23 year old out there who's gonna buy into what he says. And that's the dangerousness of Mr. Algee.

(Sentencing Hr'g at 20-21.)

The District Court even commented on the appearance of vindictiveness of the Government's prosecution of Algee as well as the attacks on Christenson when he characterized the prosecutors' retaliatory conduct as "hair brain" (R. Tr. Vol. III, pp. 56, lines 19-22) and observed that "Mr. Christenson defeated, and embarrassingly so, the present United States Attorney in the underlying case. And this is simply payback to Mr. Christenson and Mr. Algee." (R. Tr. Vol. III, pp. 59-60.)

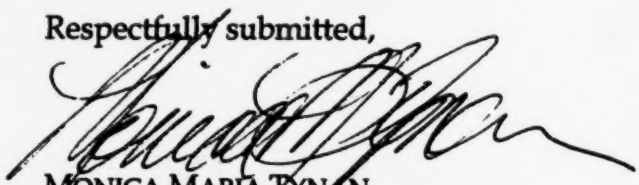
The likelihood of vindictiveness of this prosecution of Algee is obvious and therefore Algee's convictions on all

four counts should be reversed. Accordingly, this Court should grant Algee's Petition for Writ of Certiorari.

## CONCLUSION

For all the reasons stated above, this Court should grant Petitioner Stanley E. Algee's petition for Writ of Certiorari and reverse the judgment below.

Respectfully submitted,



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JANUARY 29, 2003

## APPENDIX


| | |
|---|---|
| *United States v. Algee* | A. 1-11 |
| Superseding Indictment | A. 12-14 |

# In the
# United States Court of Appeals
## For the Seventh Circuit

No. 01-2208

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

STANLEY E. ALGEE,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Southern District of Illinois.
No. 4:00CR40023-001—**G. Patrick Murphy**, *Chief Judge.*

ARGUED SEPTEMBER 4, 2002—DECIDED OCTOBER 31, 2002

Before FLAUM, *Chief Judge*, and CUDAHY and KANNE, *Circuit Judges.*

FLAUM, *Chief Judge.* After a jury trial, Stanley Algee was convicted of conspiracy to distribute and to possess with intent to distribute crack cocaine, conspiracy to possess with intent to distribute marijuana, possession of a firearm by a felon, and use of a firearm during a drug-trafficking offense, and was sentenced to a total of 300 months' imprisonment. Algee now challenges his convictions and sentences, arguing among other things that his Sixth Amendment rights were violated when the district court disqualified his attorney of choice. We affirm.

## I. BACKGROUND

In December 1996 Algee was arrested after he broke into a residence in Grand Tower, Illinois. He was later charged in an Illinois circuit court with armed violence, home invasion, armed robbery, aggravated battery, and unlawful possession of a weapon. Attorney Paul Christenson entered his appearance for both Algee and co-defendant Brent Battles.

Following his arrest Battles gave a taped statement implicating Algee, himself, and a third individual, Marvin Gates, in the Grand Tower incident. After Gates was arrested, Christenson entered an appearance on his behalf and moved to withdraw as counsel for Battles. The state, meanwhile, moved to disqualify Christenson from representing Algee and Gates, asserting that he had a conflict of interest due to his prior representation of Battles. The trial court granted the state's motion.

Algee and Battles were convicted following a jury trial and a bench trial, respectively. Gates was acquitted. On appeal, however, the Appellate Court of Illinois reversed Algee's and Battles's convictions, holding that the state had violated Illinois's speedy-trial statute. *People v. Battles*, 724 N.E.2d 997 (Ill. App. Ct. 2000).

After their state convictions were reversed, Algee and Battles were indicted in federal district court on charges relating to the Grand Tower incident. Algee was specifically charged with unlawful possession of a firearm by a felon and using or carrying a firearm during and in relation to a drug-trafficking offense. A superseding indictment was later returned, adding the drug-distribution charges.

After Algee retained Christenson to represent him in the federal case, the government moved for disqualification, claiming that Christenson had an unwaivable conflict of interest because of his prior representation of Battles

and Gates and because Christenson had testified as a defense witness during Algee's state-court trial. In support of its motion, the government asserted that Gates had given a statement implicating Algee in the Grand Tower offenses and was expected to testify against him. The government also pointed to the taped statement given earlier by Battles. After a magistrate judge denied the motion, the government moved for reconsideration, raising new allegations that Christenson had received cocaine from Algee in exchange for legal services. The magistrate judge then vacated his earlier ruling and referred the matter to the district judge. The same day, co-defendant Battles filed his own motion to disqualify Christenson, asserting that during the state-court proceedings "a direct conflict of interest arose between Mr. Christenson's representation of Mr. Battles and his representation of either Mr. Algee or Mr. Gates." Battles indicated in his motion that he was unwilling to waive the conflict.

A hearing was held on the two motions, during which the government advised the district court of new information that one of Christenson's then-clients, Eldridge Hartley, had recently implicated Algee and was expected to testify as a government witness. After considering arguments from both sides, the district court stated:

> [T]he problem is . . . where you [Christenson] represented another client, two of them that are potential witnesses against Mr. Algee, the present defendant before the Court that you represent—you represented all three of them at one time—how do we ever sort out, how do we ever sort out what information you got from them and to be able to set that aside and that can never be used or considered from them coming in on the witness stand and testifying against your client and you cross-examining them? . . . [I]t's almost impossible for an attorney to represent two defendants in a criminal case at any time. And you must

> have talked to Mr. Battles. You must have talked to Mr. Gates. You must have acquired some information, and you're on the hot seat with this whole thing ethically.

The court also found that "the bare allegations of you [Christenson] being involved in a potential drug conspiracy with the client that you want to represent here poses enormous problems." Thus concluding that there was a material conflict that was nonwaivable, the court granted the government's and Battles's respective motions.

## II. DISCUSSION

Algee's primary contention on appeal is that his Sixth Amendment rights were violated when the district court disqualified Christenson, his attorney of choice. It is well-settled, however, that a criminal defendant's right to his chosen attorney may be outweighed by a serious potential for conflict due to the attorney's prior representation of other defendants charged in the same criminal conspiracy. *Wheat v. United States*, 486 U.S. 153 (1988); *United States v. Combs*, 222 F.3d 353, 361 (7th Cir. 2000). Further, because of the dangers associated with multiple representation, a district court must be allowed "substantial latitude" in refusing waivers of conflicts of interest. *Wheat*, 486 U.S. at 163. We therefore review a district court's refusal of a waiver only for an abuse of discretion. *Combs*, 222 F.3d at 360.

This case is similar to *Wheat*, where the Supreme Court upheld the district court's refusal to allow the defendant to substitute an attorney who had previously represented two other defendants charged in the same criminal conspiracy. 486 U.S. at 164. The Court reasoned that the potential for conflict, when looking at the situation as it existed before trial, was evident—that is, in the likely event that the defendant's co-conspirators were to tes-

tify, his chosen counsel would have been unable ethically to provide vigorous cross-examination. *Id.* Thus, acknowledging that the trial court was in the best position to evaluate the facts and circumstances of each case, the Court concluded that there had been no abuse of discretion. *Id.*; *see also Combs*, 222 F.3d at 361-62 (district court was within its discretion in dismissing a defense attorney who had earlier given legal advice to a key government witness).

Here the district court was confronted with a situation like that in *Wheat*—Christenson, Algee's counsel of choice, had previously represented Battles, a co-defendant charged in the same criminal conspiracy. Further, Christenson had also represented Gates, whom the government intended to call as a witness, and was then currently representing Hartley, another potential government witness. Given these circumstances we cannot say that the court's decision to disqualify Christenson was an abuse of discretion. The court foresaw that Battles and Gates would be the principal witnesses for the government and reasonably concluded that ethical constraints would prohibit Christenson from cross-examining them in any meaningful way. This case in fact presents a more compelling argument for disqualification than did *Wheat* because Battles joined in the motion to disqualify Christenson, whereas the co-defendants in *Wheat* were willing to waive their rights to conflict-free counsel. *Wheat*, 486 U.S. at 156; *see also United States v. O'Malley*, 786 F.2d 786, 792 (7th Cir. 1986) (in deciding to disqualify defendant's chosen attorney, district court properly considered interests of the attorney's former client, who was also a key government witness, where that client had made it clear that he viewed the risk of an intrusion upon his attorney-client privilege as substantial).

Turning to Algee's remaining arguments, we initially address the government's contention that Algee has waived

all of them. Waiver, however, involves *intentional* relinquishment, *United States v. Woods*, 301 F.3d 556, 560 (7th Cir. 2002), here absent. Algee's arguments are thus forfeited, not waived, and so we review them for plain error. *Id.*

Algee contends that his convictions were the result of prosecutorial vindictiveness. In order to be successful on such a claim, a defendant must affirmatively show through objective evidence that the prosecutorial conduct was motivated by some sort of animus. *United States v. Spears*, 159 F.3d 1081, 1086 (7th Cir. 1998). Algee gives four examples that he says shows animus in this case: (1) he faced a greater penalty under the federal charges than he received in state court for the same conduct; (2) the federal charges "were brought by the prosecutors who had prosecuted Algee on at least four prior occasions in Illinois state court and lost"; (3) the government "lodged allegations that Christenson had engaged in illegal conduct, ultimately leading to his disqualification as Algee's counsel of choice"; and (4) the government moved for an upward departure from the sentencing guidelines based on an under-representation of Algee's criminal history. These allegations do not rise to the level necessary to establish prosecutorial vindictiveness, especially under the lens of plain-error review. First, we note that Algee actually received a *lesser* sentence in federal court than he did in state court for the same conduct—fifteen years on the federal firearms charges compared to a forty-year sentence on the state charges. Also, the fact that there was some overlap between the personnel in the state prosecutor's office and the United States Attorney's office does not support a finding of prosecutorial vindictiveness. *United States v. Heidecke*, 900 F.2d 1155, 1160 (7th Cir. 1990). Algee maintains that W. Charles Grace, the United States Attorney for the Southern District of Illinois at the time this case was filed, had "previously failed after at least

four attempts . . . to convict Algee" and had displayed "intense personal animus towards Algee." Grace, however, recused himself from Algee's federal case, and so Algee cannot sustain that Grace's alleged animus was the driving force behind the prosecution. Finally, Algee gives no explanation how vindictiveness is shown by the government's actions in moving for disqualification of an attorney hampered by a conflict of interest, or in moving for an upward departure authorized by the sentencing guidelines.

Algee next advances that his federal prosecution was barred by double jeopardy. As Algee concedes, however, the Double Jeopardy Clause does not apply when two different sovereigns are involved. *United States v. Ray*, 238 F.3d 828, 835 (7th Cir. 2001). Algee attempts to get around the dual-sovereignty doctrine by invoking what is called the "sham prosecution" exception. But this concept is a very narrow one (if it exists at all, *see United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997)) and would apply only if the defendant shows that the second sovereign was acting as a "mere puppet" of the first. *Id.* Algee has not presented such a case. Though Algee makes much of the fact that United States Attorney Grace had previously prosecuted him in state court, he does not explain how this prior professional activity establishes that the federal prosecution was a "sham." Algee's otherwise unsupported argument fails.

Algee's next contention—that his conviction on one of the firearms counts was the result of an impermissibly broadened indictment—has more merit. Count 3 of the superseding indictment charged Algee with knowingly possessing, after having previously been convicted of a felony, a firearm, "*that is* a Norinco, model SKS, 7.62 caliber, semi-automatic rifle, and a Harrington and Richardson, model 'Victor,' .22 caliber revolver." At trial, however, evidence of five firearms, including the two listed

in the superseding indictment, were introduced. Further, the jury was instructed that it had to conclude only that Algee "knowingly possessed *a* firearm" to find him guilty on the count.

The facts of this case are much like those in *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991), where the indictment alleged that the defendant "did knowingly use and carry a firearm, *to wit*: a Mossberg rifle, Model 250CA." *Id.* at 374 (emphasis added). At trial two additional guns were put into evidence, and the jury was instructed that a conviction hinged on proof that the defendant "intentionally used or carried *a* firearm." *Id.* at 374-75. We concluded that the indictment had been impermissibly broadened. The Mossberg weapon, we said, was an essential part of the charge; thus, the evidence of additional firearms, combined with the faulty jury instruction, allowed the trial jury to convict the defendant on charges that the grand jury never made against him. *Id.* at 379.

There is, however, a crucial distinction between *Leichtnam* and this case. In *Leichtnam* we did not review the defendant's arguments under the plain-error standard because the government had not argued forfeiture on appeal. *Id.* at 375. But had our review been limited to a search for plain error, we indicated that the conviction would likely have been upheld as there was enough evidence to support a finding that the defendant had used and carried the specific firearm identified in the indictment. *Id.* Here the government contends that Algee is precluded from raising his arguments. Because Algee forfeited the issue he had to establish not only that there was error and that it was plain, but also that the error affected "substantial rights." *United States v. Olano*, 507 U.S. 725, 734 (1993); *United States v. Ackley*, 296 F.3d 603, 606 (7th Cir. 2002). Algee has not even attempted to meet this burden. Instead, he maintains that the gov-

ernment "cannot prove that the jury did not convict Algee on Count III based upon the evidence introduced regarding the three additional firearms not specifically listed in the Superseding Indictment." But as we have already said, the burden of persuasion was on *Algee* with respect to prejudice; the placing of this burden on the defendant rather than the government is a specific requirement of plain-error review. *Olano*, 507 U.S. at 734. And it is unlikely that Algee could have established prejudice in any case. As the government points out, there was an abundance of evidence proving that Algee did knowingly possess the two firearms specifically listed in the superseding indictment.

Algee also contends that his conviction for using a firearm during a drug-trafficking offense resulted from an impermissible broadening of the indictment. But after examining his argument, we conclude that it is best characterized as a challenge to the sufficiency of the evidence. Specifically, Algee maintains that the government introduced no evidence supporting the charge other than the testimony of Battles and Gates, both of whom, Algee says, are admitted liars. Credibility determinations, however, are within the province of the jury, and we will not reverse them just because the credited testimony comes from confessed law-breakers or known liars. *United States v. Wright*, 218 F.3d 812, 813 (7th Cir. 2000). Algee offers no other reason why the testimony was wrongly credited, and so we conclude that there was sufficient evidence to support his conviction on this charge.

Finally, relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Algee argues that his sentence on the crack-cocaine conviction is unconstitutional because the district court held him accountable for drug quantities that were not submitted to the jury and proved beyond a reasonable doubt. Though Algee concedes that his ten-year sentence falls within the statutory cap, *see* 21 U.S.C.

§ 841(b)(1)(A), he contends that *Apprendi* also governs proof of events that determine the mandatory *minimum* penalty. We have consistently rejected such arguments, *e.g.*, *United States v. Nubuor*, 274 F.3d 435, 444 (7th Cir. 2001), and see no reason why we should hold differently here.

## III. CONCLUSION

The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

**UNITED STATES COURT OF APPEALS**
For the Seventh Circuit
Chicago, Illinois 60604

November 8, 2002

**Before**

Honorable JOEL M. FLAUM, *Chief Judge*

Honorable RICHARD D. CUDAHY, *Circuit Judge*

Honorable, MICHAEL S. KANNE, *Circuit Judge*

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee, | ) | Appeal from the<br>United States District<br>Court for the Southern |
| No. 01-2208 v. | ) | District of Illinois. |
| STANLEY E. ALGEE,<br>Defendant-Appellant. | ) | No. 00 CR 40023 |
| | ) | G. Patrick Murphy,<br>Chief Judge. |

**ORDER**

The opinion issued by this court on October 31, 2002 is amended as follows. On the ninth page of the opinion, the second paragraph, line six, should be modified to read as follows: Though Algee concedes that his "twenty"-year . . .

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | CRIMINAL |
| | ) | NO. 00-40023-JLF |
| v. | ) | |
| | ) | Title 21, United States |
| STANLEY E. ALGEE, | ) | Code, Sections 841 |
| BRENT A. BATTLES, | ) | and 846, and Title 18, |
| | ) | United States Code, |
| Defendants. | ) | Sections 922(g)(1) and |
| | ) | 924(c) |

**SUPERSEDING INDICTMENT**

**THE GRAND JURY CHARGES:**

**Count I**

From in or about January 1996, to on or about December 18, 1996, in Jackson County, within the Southern District of Illinois,

STANLEY E. ALGEE,

defendant herein, did knowingly and intentionally conspire and agree with other persons known and unknown to the Grand Jury, to knowingly and intentionally distribute and possess with intent to distribute in excess of 5 grams of a mixture and substance containing cocaine base, "crack cocaine," a Schedule II, Narcotic Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

**Count 2**

On or about December 18, 1996, in Jackson County, within the Southern District of Illinois,

STANLEY E. ALGEE,

defendant herein, did knowingly and intentionally conspire and agree with Brent Battles and Marvin Gates and with other persons known and unknown to the Grand Jury, to knowingly and intentionally distribute and possess with intent to distribute marihuana, a Schedule I, Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); all in violation of Title 21, United States Code, Section 846.

**Count 3**

On or about December 18, 1996, in Jackson County, within the Southern District of Illinois,

STANLEY E. ALGEE,

defendant herein, having previously been convicted of a felony punishable by imprisonment for a term exceeding one year, namely: Unlawful Delivery of a Controlled Substance, in case number 80-CF-104, on May 12, 1980, in the First Judicial Circuit, Jackson County, Illinois, did knowingly posses, in and affecting commerce, a firearm, that is a Norinco, model SKS, 7.62 caliber, semi-automatic rifle, and a Harrington and Richardson, model "Victor," .22 caliber revolver, all in violation of Title 18, United States Code, Section 922(g).

**Count 4**

On or about December 18, 1996, in Jackson County, within the Southern District of Illinois,

STANLEY E. ALGEE,
BRENT A. BATTLES,

defendants herein, during and in relation to a drug trafficking crime for which they may be prosecuted in a court of the United States, to wit: conspiracy to possess with intent to distribute marihuana, a Schedule I, Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1) and 846, did use or carry a firearm, in violation of Title 18, United States Code, Section 924(c).

**A TRUE BILL**

/s/_____
FOREPERSON

/s/_____
ROBERT L. SIMPKINS
First Assistant

Recommended Bond: Detention